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No. 83-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN ET AL.,
Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that employers and representatives of workers in the knitted outerwear industry had standing to challenge the Secretary of Labor's rescission of a regulation generally prohibiting homework in the knitted outerwear industry, which had been promulgated to make enforcement of the minimum wage feasible in that industry.

2. Whether the court below correctly held that the Secretary of Labor's rescission of the homework regulation was arbitrary and capricious within the meaning of the Administrative Procedure Act because:

   a. The Secretary did not consider or explain his rejection of less far-reaching alternatives that originally were suggested by the Secretary, on which there was substantial testimony and comment during rulemaking proceedings, and the adoption of which was supported by the Secretary's own explanation of the reasons for rescission.

   b. The Secretary failed to consider adequately a number of factors that were directly relevant to his determination that enforcement of the minimum wage among homeworkers would be feasible if the restriction on homework employment was rescinded.*

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* Although they are not presented as questions in the petition, the following issues are discussed by petitioners in their argument: (1) whether the court below properly held that informal agency action to rescind a regulation is reviewable under the same standard that applies to informal agency rulemaking generally, and (2) whether the court below correctly held that the rescission was arbitrary and capricious because, notwithstanding the Secretary's stated purpose to increase employment opportunities in the knitted outerwear industry, the Secretary failed to consider the net effect of rescission on overall employment opportunities in that industry.

PARTIES BELOW

Plaintiffs/Appellants (Respondents on this Brief in Opposition):

International Ladies' Garment Workers' Union

Donald Vial, as Director of Industrial Relations of the State of California

Patrick W. Henning, as Labor Commissioner and Chief of the Division of Labor Standards Enforcement of the State of California

Lillian Roberts, as Industrial Commissioner of the State of New York

Amalgamated Clothing and Textile Workers Union, AFL-CIO

Dalton Industries, Inc.

Dalton Industries has no parent corporation or affiliates, and has three subsidiaries: Columbus Shirt Company; Dalton Sales Corporation, and Dalton Imports, Inc.

Knitgoods Workers' Union, Local 155, I.L.G.W.U.

Knitgoods Workers' Union, Local 190, I.L.G.W.U.

Knitted Outerwear Manufacturers Association, Pennsylvania District

Myer Manufacturing, Inc.

Myer Manufacturing has no parent corporation, subsidiaries, or affiliates.

United Knitwear Manufacturers League, Inc.

The League has no parent corporation, subsidiaries, or affiliates.

Defendants/Appellees:

Raymond J. Donovan, as Secretary of Labor of the United States

William M. Otter, as Administrator of the Wage and Hour Division of the United States Department of Labor

Intervening Defendants/Appellees:

Stowe Woolens, Ltd.

Luella Breen

Cecile Duffany

Linda Guetti

Mary Hon

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	1
Background	2
Administrative Proceedings	3
Proceedings Below	4
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. There Is No Substantial Question Presented As To Plaintiffs' Standing	6
A. The Courts Below Properly Found Sufficient Connection Between Plaintiffs' Alleged Injury and the Secretary's Challenged Action	6
B. Plaintiffs Are Within the Zone of Interests Protected by the Fair Labor Standards Act	8
II. The Court Of Appeals' Holding That The Secretary's Rescission Of The Restriction On Homework In The Knitted Outerwear Industry Was Arbitrary And Capricious Is Correct And Does Not Present A Substantial Question Warranting Review	9
A. The Court of Appeals Applied the Proper Standard of Review	9

TABLE OF CONTENTS—Continued

Page

B. The Court of Appeals' Holding That the Secretary's Failure to Consider Certain Known Alternatives to Rescission Was Arbitrary and Capricious Is Based on Established Precedent and Does Not Present a Substantial Question 12

C. The Court of Appeals' Holding That the Secretary Made an Unreasoned Determination That Enforcement of the Minimum Wage Would Be Feasible Without Restricting Homework Does Not Present a Substantial Question 15

D. The Court of Appeals Correctly Held That the Secretary's Failure to Consider the Possible Curtailment of Employment in the Knitted Outerwear Industry As a Result of Rescission Was Arbitrary and Capricious.... 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

Alabama Association of Insurance Agents v. *Board of Governors*, 533 F.2d 224 (5th Cir. 1976), *vacated in part*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) 11

Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800 (1973) 10

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 5

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 10

Gemsco, Inc. v. *Walling*, 324 U.S. 244 (1945) 2, 15

Motor Vehicle Manufacturers Association v. *State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953 (U.S. June 24, 1983) ..... *passim*

National Nutritional Foods Association v. *Weinberger*, 512 F.2d 688 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975) 12

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) 6, 7, 8

STATUTES:

Administrative Procedure Act:

5 U.S.C. § 706(2)(A) (1982) 2, 4, 9, 12

5 U.S.C. § 553 (1982) 9

5 U.S.C. § 553(c) (1982) 4, 12

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* (1982) 2

§ 2(a), 29 U.S.C. § 202(a) (1982) 2, 8

§ 8(f), 29 U.S.C. § 208(f) (1982) 2

§ 11(d), 29 U.S.C. § 211(d) (1982) 2, 14

Fair Labor Standards Amendments of 1949, ch. 736, 63 Stat. 910 2

Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 8

ADMINISTRATIVE MATERIALS:

29 C.F.R. Part 530 (1981) 2

45 Fed. Reg. 80,555 (Dec. 5, 1980) 3, 12

TABLE OF AUTHORITIES—Continued

	Page
46 Fed. Reg. 25,108 (May 5, 1981)	3, 12
46 Fed. Reg. 50,348 (Oct. 9, 1981)	*passim*
49 Fed. Reg. 11,786 (Mar. 27, 1984)	4

OTHER AUTHORITIES:

H.R. Rep. No. 2182, 75th Cong., 3d Sess. (1938)	8
H.R. Rep. No. 75, 87th Cong., 1st Sess. (1961)	8

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BRIEF FOR RESPONDENTS INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. IN OPPOSITION

Respondents International Ladies' Garment Workers' Union *et al.* (ILGWU)[1] respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

Petitioners seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit setting aside the Secretary of Labor's rescission of a regulation that, since 1942, had restricted industrial homework in the knitted outerwear industry to ensure

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[1] Respondents on this Brief in Opposition were plaintiffs in the district court and appellants in the court of appeals. See *supra* p. ii.

adequate enforcement of the minimum wage pursuant to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.* The court below held that the rescission was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

Background

The history of the homework restriction is described in the opinion of the court of appeals, Pet. App. 3-14, and summarized only briefly here. Four years after the enactment of the FLSA to ensure "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202(a), the Administrator of the Wage and Hour Division of the Department of Labor promulgated a minimum wage order that generally prohibited homework in the knitted outerwear industry.[2] The order, which the Administrator had concluded after extensive hearings was necessary to safeguard the minimum wage rate prescribed for the industry, became effective on April 20, 1942. For almost forty years thereafter, the homework restriction remained in effect in the knitted outerwear industry. See 29 C.F.R. Part 530, Pet. App. 146-56.[3]

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[2] The Administrator promulgated like orders for six other industries: embroideries, jewelry, women's apparel, gloves and mittens, button and buckle, and handkerchief. See *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 247 n. 5 (1945).

[3] The Administrator's authority to prohibit homework pursuant to § 8(f) of the FLSA, 29 U.S.C. § 208(f), was upheld by this Court in 1945. *Gemsco Inc.* v. *Walling, supra.* In 1949, Congress added a new § 11(d) to the Act, which declared that "all existing regulations or orders of the Administrator relating to industrial homework" were "continued in full force and effect" and expressly authorized the Administrator to adopt "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act * * *." 63 Stat. 916-17, 29 U.S.C. § 211(d).

Administrative Proceedings

On December 5, 1980, the Wage and Hour Division published a notice of hearings "to obtain information on the current situation with respect to industrial homework and the extent to which it may have a bearing on the Secretary's statutory responsibility 'to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed' in the Fair Labor Standards Act." 45 Fed. Reg. 80,555, Pet. App. 157, 159. Information was specifically requested on five issues, including "[w]hether the certificate requirements [for exemption from the homework prohibition] should be revised to recognize additional circumstances justifying certification * * *" and "[w]hether the certificate requirements should differentiate between urban and rural areas." Pet. App. 159. Hearings were conducted in January and February 1981.

On May 5, 1981, the Wage and Hour Division published a notice of proposed rulemaking, stating that "[a]fter careful consideration of the oral testimony and written comments received as a result of the hearings, as well as information the Department has obtained independently, it is proposed that Regulations 29 CFR Part 530 [restricting homework] be removed." 46 Fed. Reg. 25,108, Pet. App. 161. The notice stated further, among other things, that the testimony received at the hearings had been "conflicting" regarding the "effectiveness of the Regulations in safeguarding the minimum wage * * *." Pet. App. 164-65.

In response to the notice of proposed rulemaking, over 10,000 comments were submitted. Well over half of these opposed the proposed rule. On October 9, 1981, the Secretary published a final rule that rescinded the homework restriction in the knitted outerwear industry as of November 9, 1981. 46 Fed. Reg. 50,348, Pet. App. 167.

Proceedings Below

Respondents ILGWU *et al.* brought suit on October 27, 1981, principally alleging that the rescission of the restriction on homework in the knitted outerwear industry was arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706(2)(A), and that it was not accompanied by an adequate statement of basis and purpose, as required by 5 U.S.C. § 553(c). In an unpublished opinion, the district court upheld the rescission on the parties' cross-motions for summary judgment. See Pet. App. 67-103. The court of appeals affirmed the district court's determination that the ILGWU *et al.* had standing to challenge the rescission, Pet. App. 16-30, and reversed on the merits, holding that the rescission was arbitrary and capricious for several reasons: Principally, the Secretary failed to consider or explain his rejection of several alternatives to total rescission that originally were raised in the notice of hearing. Pet. App. 37-43. In addition, the Secretary did not make a reasoned determination that enforcement of the minimum wage was feasible among knitted outerwear homeworkers if the restriction was lifted, Pet. App. 43-60, and the Secretary failed to consider whether rescission would curtail employment opportunities in the knitted outerwear industry generally, despite his conceded purpose to increase employment in the industry, Pet. App. 60-64.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to petitioners' claims, the questions presented in this case were correctly decided by the court of appeals and are of limited significance. The Secretary of Labor, who promulgated the rule at issue, elected not to seek review in this Court. Instead, he commenced a new rulemaking proceeding, 49 Fed. Reg. 11,786 (Mar. 27, 1984), in which the comment period has already closed.

In any event, petitioners do not present any substantial questions that warrant review by this Court. *First,*

both courts below agreed, on the basis of established precedents of this Court, that plaintiffs ILGWU *et al.* had standing to challenge the rescission, because their alleged injury was directly attributable to the Secretary's action and they were within the zone of interests protected by the FLSA. Petitioners' argument to the contrary does not withstand analysis and does not demonstrate a conflict in the circuits. *Second*, the court of appeals' determination that the rescission was arbitrary and capricious was based in significant part on the principles of review and reasoned decisionmaking articulated by this Court's decision last Term in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953 (U.S. June 24, 1983), as well as on other established precedents. Essentially, the court of appeals held that the Secretary had "failed to consider[] important aspect[s] of the problem," *id.* at 4956, and had not shown a "rational connection between the facts found and the choice made," *id.*, quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). See Pet. App. 42-43, 58-60, 63. The court's judgment was correct, as we show below, and does not merit further review.

ARGUMENT

I. THERE IS NO SUBSTANTIAL QUESTION PRESENTED AS TO PLAINTIFFS' STANDING.

Petitioners contend that plaintiffs lacked standing to challenge the Secretary's decision to rescind the ban on homework in the knitted outerwear industry on two grounds: (1) plaintiffs failed to demonstrate the necessary connection between the Secretary's rulemaking and the alleged injury to plaintiffs, Pet. 23-29; and (2) the alleged injury does not lie within the "zone of interests" intended to be protected by the FLSA, Pet. 29-32. On each ground, petitioners fail to demonstrate that the decision of the court of appeals, affirming the district court on this point, was incorrect or that the decision conflicts with those of other courts of appeals or of this Court.

A. The Courts Below Properly Found Sufficient Connection Between Plaintiffs' Alleged Injury and the Secretary's Challenged Action.

In arguing that plaintiffs failed "to demonstrate the necessary connection between the Defendant and the alleged injury," Pet. 23-29, petitioners rely on *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), where this Court said: "[A] federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant[s], and not injury that results from the independent action of some third party not before the court." Petitioners argue that the "direct result of the removal of the prohibition on homework by the Secretary is *not* payment of subminimum wages, but rather employment of homeworkers," Pet. 26, and that it is "only the independent and illegal action of third parties—homeworker employers who may choose to violate the FLSA—which will result in subminimum wage payments," *id.* (footnote omitted). But the court below applied the principle of the *Simon* decision, and petitioners' contention that it did not ignores

the entire basis of plaintiffs' challenge to the Secretary's action.

The court of appeals, after quoting the language from *Simon* on which petitioners rely, Pet. App. 26, stated:

> "The appellants allege that unfair competition (*i.e.*, payment of subminimum wages) from homeworker employers will injure factory employers paying lawful wages and the resulting pressures to lay off workers and reduce wages will injure factory employees. * * * The alleged injuries can be redressed by controlling the source of the unfair competition (*i.e.*, restricting employment of homeworkers) * * *.
>
> "* * * [T]he relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal; only by taking extraordinary measures—*i.e.*, violating the law or starting new businesses overseas—could third parties prevent redress of the appellants' injuries." Pet. App. 26-28 (footnote omitted).

Although payment of subminimum wages would have remained unlawful under the Secretary's final rule of rescission, see Pet. 24-25, the effect of striking down the rescission was to make the employment of homeworkers in the knitted outerwear industry unlawful at any wage rate. The basis of plaintiffs' attack on the rescission was that the Secretary would be unable to enforce the statutory ban on subminimum wages in the knitted outerwear industry without maintaining the regulatory ban on the employment of homeworkers in that industry. That attack on the Secretary's rule was substantial since it persuaded the court of appeals on the merits, and petitioners do not in any event question the premise that plaintiffs' allegations must be taken as true for the purpose of assessing standing. Since plaintiffs' position on the merits was that violations of the subminimum wage requirement in the knitted outerwear industry would increase in the absence of the regulatory ban on home-

work, the court of appeals correctly ruled that the injuries that would allegedly flow from the Secretary's rule were sufficient to give plaintiffs standing under *Simon* and other relevant decisions of this Court. Petitioners do not contend that the decision of the court of appeals conflicts with the decisions of other federal courts of appeals, and there is no reason for this Court to grant review.

B. Plaintiffs Are Within the Zone of Interests Protected by the Fair Labor Standards Act.

The court of appeals stated that there are "clear indicia" in the legislative history "that compliant employers and their employees are within the zone of interests protected by the [FLSA]." Pet. App. 25. For example, "The language and history [of the FLSA] unmistakably evidence an intent to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force." Pet. App. 21. The court relied on the language of § 2(a) of the Act, 29 U.S.C. § 202(a), which provides that the existence of subminimum standards "constitutes an unfair method of competition in commerce" and on a statement in the legislative history that "no employee * * * need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes." H.R. Rep. No. 2182, 75th Cong., 3d Sess. 6-7 (1938), as quoted at Pet. App. 21. The court relied in addition on the legislative history of the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65. These amendments, the House Report stated, "would increase the level of compliance with the statute, and *would protect complying employers* from the unfair wage competition of the noncomplying employers." H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961), as quoted at Pet. App. 22 (emphasis by the court).

Thus, plaintiffs in this case—who included both employers and representatives of covered workers in factories and shops and who alleged in effect that they would suffer adverse "economic consequences of subminimum wages paid to a small sector of the labor force" (that is, noncomplying homeworkers)—were within the zone of interests protected by the FLSA. The part of the petition that seeks review of that issue (Pet. 29-31) is bereft of any authority indicating that the courts below may have erred. There is, in sum, no reason for this Court to grant review on the issue of standing.

II. THE COURT OF APPEALS' HOLDING THAT THE SECRETARY'S RESCISSION OF THE RESTRICTION ON HOMEWORK IN THE KNITTED OUTERWEAR INDUSTRY WAS ARBITRARY AND CAPRICIOUS IS CORRECT AND DOES NOT PRESENT A SUBSTANTIAL QUESTION WARRANTING REVIEW.

A. The Court of Appeals Applied the Proper Standard of Review.

The court below held that, since the rescission of the homework rule was the product of informal, notice-and-comment rulemaking pursuant to the APA, 5 U.S.C. § 553, the rescission was unlawful if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). Pet. App. 30. While the appellees below, including petitioners, contended that judicial review of the rescission should be especially deferential because the longstanding rule against homework in the knitted outerwear industry had not been "seriously reexamined for forty years," Pet. App. 32, the court of appeals found that the proper standard of review was established by this Court's decision in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953, 4956-57 (U.S. June 24, 1983): "[T]he standard of judicial review is *not* altered by the fact that the agency has

rescinded a regulation, rather than moved in some other direction." Pet. App. 31, citing *Motor Vehicle Manufacturers Association*, 51 U.S.L.W. at 4956. Accordingly, the court articulated its function, as established by numerous decisions of this Court, to " 'consider whether the decision was based on a consideration of the relevant factors,' " Pet. App. 34, quoting *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); and "to ensure that the Secretary engaged in reasoned decisionmaking," Pet. App. 36. At the same time, the court stated, its review "is focused and restricted, and it does not permit us to substitute our judgment for that of the agency." Pet. App. 34.

Petitioners now admit that the court of appeals "correctly articulated" the applicable standard of judicial review. Pet. 33-34. They claim, however, that the court below nonetheless accorded a presumption of validity "in the evidentiary sense" to the original rule prohibiting homework and, accordingly, "held the Secretary to a far more rigorous test than that required by law." Pet. 34-35. There is no basis in the opinion below for this assertion, since the court of appeals merely set out the teaching of this Court in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973), that "[t]here is * * * at least a presumption that [Congress's] policies will be carried out best if the [agency's] settled policy is adhered to." See Pet. App. 31.[4] The

[4] The court of appeals also observed that the longstanding and consistent support of the ban on homework in the knitted outerwear industry was "a sharp contrast" to circumstances in *Motor Vehicle Manufacturers Association, supra*, where the regulation at issue had been " 'imposed, amended, rescinded, reimposed and now rescinded again.' " Pet. App. 33. See also *id.* at 32 n. 30 (homework rule in effect almost forty years, but motor vehicle standard, promulgated four years prior to rescission, had never taken effect). These remarks by the court below do not, however, support petitioners' contention that the court applied "heightened scrutiny," Pet. 35, or an evidentiary-type presumption of validity, *id.*, to the rescis-

court did not suggest, either expressly or by implication, that the presumption should override a change in policy supported by the rulemaking record, as petitioners suggest.

Thus, petitioners' claim in this regard appears to be the same as their further claims, discussed below, that the court of appeals erred in ruling that the rescission was arbitrary and capricious. If that is so, then the asserted "presumption of validity" does not present a separate question warranting review by this Court. Even if petitioners' contention about the standard of review is different from their remaining contentions, however, it is no more than a recasting of their contention in the courts below—not pressed in the petition—that judicial review of the Secretary's rescission of an existing regulation should be more deferential than ordinary review of a new regulation. That argument was rejected by this Court, as the court of appeals recognized, Pet. App. 30-33, in *Motor Vehicle Manufacturers Association, supra.*

Elsewhere in their argument, petitioners suggest that the standard of review applied by the court of appeals in this case is in conflict with the standard of other circuits, because it is "far more intrusive." Pet. 52. The suggested conflict, however, is illusory. The Second Circuit and the Fifth Circuit, in the cases cited by petitioners, merely reiterated the well-established principle that the APA does not require that an agency's explanation of informal rulemaking be perfect or perfectly detailed, but only that the statement of reasons be sufficient to permit meaningful judicial review. *Alabama Association of Insurance Agents* v. *Board of Governors*, 533 F.2d 224, 236 (5th Cir. 1976), *vacated in part on other grounds*, 558

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sion of the ban on homework. Instead, they were made in explanation of the court's ruling that the standard of review enunciated in *Motor Vehicle Manufacturers Association*, rather than the extremely deferential review advocated by the Secretary, necessarily applied to the rescission.

F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). This is the same principle announced and applied by this Court in *Motor Vehicle Manufacturers Association*, *supra*, 51 U.S.L.W. at 4956, and by the court below, Pet. App. 33-34.

B. The Court of Appeals' Holding That the Secretary's Failure to Consider Certain Known Alternatives to Rescission Was Arbitrary and Capricious Is Based on Established Precedent and Does Not Present a Substantial Question.

The court of appeals' "primary basis" for setting aside the rescission of the homework prohibition was the Secretary's failure to consider and explain his rejection of certain alternatives to complete rescission that were mentioned in the December 1980 notice of hearing. Pet. App. 33.[5] See Pet. App. 159. There, the Secretary inquired "[w]hether the certificate requirements should be revised to recognize additional circumstances justifying certification, such as child care and other family demands that may tend to preclude factory employment," and "[w]hether the certificate requirements should differentiate between urban and rural areas." *Id.* As the court of appeals explained, the hearings elicited significant testimony about these options. Pet. App. 37-38. The Secretary, however, did not mention these options again, either in the notice of proposed rulemaking, Pet. App. 161, or in the basis and purpose statement accompanying the final rule, Pet. App. 167. Especially in view of the Secretary's stated reasons for rescinding the homework rule in the knitted outerwear industry, which related almost

[5] The court held that the Secretary's action in this regard was arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A), and, alternatively, offended 5 U.S.C. § 553(c), which requires an adequate statement of basis and purpose.

exclusively to the curtailment of employment opportunities in rural areas,[6] the court below found that the rescission was unreasoned, because a less far-reaching rule might have addressed the Secretary's stated concerns equally well. Pet. App. 39 & n.39. The court also noted that, in view of the uncertainties in the record about the Secretary's ability to enforce the minimum wage among homeworkers in the knitted outerwear industry, particularly in urban areas, see *infra* page 16, the Secretary should have considered a rural-only alternative. *Id.* at n.39.

Thus, the court below concluded that the Secretary's explanation "could not justify [his] drastic decision to rescind rather than modify" the homework rule. Pet. App. 40. This holding was based, in part, on the decision in *Motor Vehicle Manufacturers Association, supra*, in which this Court found that the Secretary of Transportation's explanation of his decision to rescind an automotive passive restraint requirement in its entirety did not support rescission but only modification of the requirement to meet the problems identified by the Secretary. 51 U.S.L.W. at 4958, 4960.[7]

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[6] The court explained:

> "In summarizing the evidence supporting rescission [the Secretary] said that commentators 'cited the lack of adequate transportation, the need to remain at home to care for children and other family matters, as well as the lack of factory employment in most rural areas.' [Pet. App. 171]. He also indicated that 'evidence was presented which showed that a continuation of the restrictions would have an adverse effect on employment opportunities, particularly in rural areas. * * * Much of this employment, the testimony and comments indicated, is in areas where public transportation is not available and few or no other gainful employment opportunities exist.' [Pet. App. 172]." Pet. App. 38-39.

[7] *Amicus curiae* Center on National Labor Policy, Inc., contends in this regard that *Motor Vehicle Manufacturers Association* is inapposite because that case involved a statute that, unlike the

Petitioners contend that the ruling on the issue of alternatives encompasses two significant errors that warrant review by this Court. Pet. 48-49. First, they claim that the court of appeals required a far more extensive analysis of alternatives than is authorized by the APA. As described above, however, the court of appeals focussed on the alternatives to complete rescission that originally were suggested by the Secretary himself, on which there was substantial testimony and comment during the rulemaking proceedings, and the adoption of which was supported by the Secretary's own explanation of his final rule rescinding the homework prohibition. The court of appeals specifically held that:

> "the Secretary should have considered and explained why *the proposals mentioned in his notice of hearing* were inconsistent with the balance he sought between maximizing employment and effective enforcement of the minimum wage." Pet. App. 42 (emphasis added).

Second, petitioners contend that the court's ruling on the issue of alternatives depends on a misconstruction of § 11(d) of the FLSA, 29 U.S.C. § 211(d). But § 11(d) authorizes any degree of restriction that the Secretary reasonably determines is necessary or appropriate to enforce the minimum wage, and so potentially encompasses the alternatives discussed by the court of appeals. The court of appeals required consideration of certain alternatives in conjunction with its determination that the Secretary had not made a reasoned decision about enforcement feasibility. See Pet. App. 39 n.39. Accordingly, there is no basis for petitioners' dramatic assertion that "[i]t is now * * * the unlikely law of the District of Columbia that an agency may not rescind a regulation which has reasonably been found *not* to further the statu-

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FLSA, "mandated consideration of certain alternatives before rescinding a regulation." Brief of *Amicus Curiae*, Part IV-A. The Center cites no authority for this proposition, and, in any event, this Court did not rely on such a statutory requirement in *Motor Vehicle Manufacturers Association.*

tory purpose, without first considering narrower versions of the unsuitable rule," Pet. 51.

In sum, petitioners have failed to show that the ruling of the court of appeals that the Secretary should have considered certain alternatives to rescission of the extant homework rule is incorrect or in conflict with decisions of this Court.

C. The Court of Appeals' Holding That the Secretary's Determination That Enforcement of the Minimum Wage Would Be Feasible Without Restricting Homework Was Unreasoned Does Not Present a Substantial Question.

Although the purpose of the restrictions on homework in the knitted outerwear and six other industries was to make possible the enforcement of the minimum wage and other fair labor standards in those industries, see *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 250-51 (1945), the Secretary's explanation for his rescission of the rule in the knitted outerwear industry included little discussion of enforcement feasibility. He stated that "[s]ince it appears that homeworkers will comprise only a small percentage of the * * * production employees in this industry, an effective enforcement program is feasible." Pet. App. 173. He also asserted that conditions had changed since 1942 because (1) in 1942, approximately twenty percent of all knitted outerwear employees were homeworkers; (2) the Department of Labor's enforcement program was then newly established; and (3) "acceptance of the principle of a minimum wage among covered employers was much less prevalent than at present." *Id.* The Secretary offered no further explanation of his determination that the homework restriction was no longer necessary for enforcement of the minimum wage in the knitted outerwear industry.

Upon review of the administrative record, the court of appeals found that the evidence supporting the Secre-

tary's determination was "minimal," Pet. App. 43, and that there was "substantial evidence" that enforcement of the minimum wage was not feasible, *id.* at 45. The evidence of infeasibility included the testimony and comments of current and former enforcement officials of the U.S. Department of Labor and of state officials performing similar functions, as well as historical evidence of conditions prior to the imposition of the restriction in 1942. *Id.* at 45-47.

Ultimately, the court concluded that the Secretary's determination was not the product of reasoned decisionmaking because he had not sufficiently considered or addressed certain factors "that may be highly relevant to the Department's ability to enforce the [FLSA] without homework restrictions." Pet. App. 53. These factors included the possibility that the number of homeknitters would increase substantially if the restriction was rescinded, particularly in view of the Secretary's stated purpose to increase employment opportunities, Pet. App. 53-54; the record evidence suggesting that enforcement problems would be materially different in rural and urban areas, Pet. App. 55; and the characteristics of homework in the knitted outerwear industry, first identified by the Department in 1942 and subsequently analyzed by testimony and comments in the rulemaking record, that might present continuing impediments to effective enforcement of the minimum wage, Pet. App. 57.

Petitioners contend that, in reviewing the Secretary's determination of enforcement feasibility, the court of appeals substituted its own judgment for that of the Secretary and "intruded * * * into an area properly left to an agency's expertise." Pet. 45-46. Their argument in this regard, however, is primarily that the court of appeals misapplied the governing principles of law to the agency record before it, see Pet. 42-45 (alleging and discussing "substantial evidence supporting the Secretary's conclusion"), and does not present a substantial question warranting review by this Court.

Petitioners also claim that the court below essentially required the Secretary to disprove the 1942 findings on which the homework restriction was based, in order to defeat what the petitioners assert to be an evidentiary-type presumption of the validity of the homework rule. See *supra* page 10. The court did not, however, demand such empirical evidence. Instead, it noted that the earlier findings "identified numerous obstacles to previous enforcement efforts when homeworkers are used and explained that these are *intrinsic* features of homeworker employment." Pet. App. 57 (emphasis by the court). It stated that testimony and analysis in the comments in the 1981 rulemaking record "suggest[ed] that the enforcement problems created by homework continue today." *Id.* at 46. Finally, it concluded that the identified obstacles to enforcement were a relevant factor to which the Secretary had failed to give adequate consideration. *Id.* at 60.

The decision of the court of appeals is consistent with *Motor Vehicle Manufacturers Association, supra.* This Court held that, in rescinding the passive restraint requirement, the Secretary of Transportation did not make a reasoned decision about the safety benefits of automatic seatbelts, and explained that this "is a matter for the agency to decide, but it must bring its expertise to bear on the question." 51 U.S.L.W. at 4959. Similarly, the court below stated that "[i]n evaluating these considerations [of impediments to enforcement of the minimum wage], we respect the Secretary's expertise in ascertaining the enforcement capacity of his staff," Pet. App. at 58-59 n.69, and ruled only that the Secretary was required to use his expertise to evaluate the feasibility of enforcement of the minimum wage in the absence of the homework prohibition. The court's decision that the Secretary failed to do so is not in conflict with the decisions of this Court, and does not present a substantial question warranting review.

D. The Court of Appeals Correctly Held That the Secretary's Failure to Consider the Possible Curtailment of Employment in the Knitted Outerwear Industry As a Result of Rescission Was Arbitrary And Capricious.

The court of appeals also ruled that the Secretary's rescission of the homework restriction in the knitted outerwear industry was arbitrary and capricious because he did not adequately consider the effect of rescission on employment in the industry generally, even though his action "was significantly motivated by his finding that substantial curtailment of employment opportunities would result from continued restrictions in the knitted outerwear industry * * *." Pet. App. 60. See also Pet. App. 172-73 ("The available evidence demonstrates that substantial curtailment of employment opportunities and earning power will result from a continuation of the restrictions * * *."). During the rulemaking proceeding, commenters indicated that one likely result of rescission would be the reduction of employment and earnings of factory workers in the restricted industries and that some manufacturers might be forced out of business. Pet. App. 62 nn. 72-73 (citing comments). The Secretary's explanation of the rescission, however, addressed only the adverse employment consequences of the homework rule for homeknitters. The court of appeals therefore concluded that the Secretary had not given sufficient consideration to the net effect of the rescission on employment and earnings in the knitted outerwear industry. Especially in view of the Secretary's conceded concern about the employment consequences of the homework rule, this holding plainly is correct.[8]

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[8] The Secretary did not take issue in the court of appeals with the ILGWU's contentions that the rescission was based on the Secretary's concern to increase employment opportunities or that he consequently was required to consider the employment benefits and detriments of rescission. Pet. App. 62.

Petitioners contend, however, that the court's ruling "imposes on the Secretary a requirement nowhere present in the FLSA," to restrict homework "for the purpose of maximizing employment opportunity in the knitted outerwear industry." Pet. 55, 61. They argue that as long as factory workers receive the minimum wage, the Secretary is not statutorily authorized to consider the employment opportunities and earning power of these workers.

Despite petitioners' attempt to characterize the court's ruling as a misconstruction of the FLSA, it is readily apparent that the court based its decision exclusively on the requirement of the APA that the Secretary provide a reasoned explanation for his action. See *Motor Vehicle Manufacturers Association, supra*, 51 U.S.L.W. at 4956. As discussed above, the Secretary's desire to increase employment opportunities was a major purpose of the rescission, and it was the Secretary's emphasis on the curtailment of employment opportunity in the knitted outerwear industry that brought that issue before the court of appeals. The court did not suggest, contrary to petitioners' claims, that the FLSA required the Secretary to maximize employment or wages in the industry. The court merely held that the Secretary could not rationally rescind the homework rule for the stated purpose of promoting employment in the knitted outerwear industry when he had not considered whether the net effect of rescission might be to decrease employment in that industry.

Accordingly, the court of appeals' decision that the Secretary's failure to consider the possible curtailment of employment throughout the knitted outerwear industry was arbitrary and capricious is correct, and does not present a substantial question warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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